

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1996-10

In re:

Protest of Masterclean, Inc.;  
Appeal by Masterclean, Inc. and  
University of South Carolina.

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)  
) **ORDER FOR**  
) **MOTION TO COMPEL**  
) **(SUBPOENA)**  
)

This case involves a construction contract controversy which was appealed to the South Carolina Procurement Review Panel (Panel) by Masterclean, Inc. (Masterclean), represented by Francis M. Mack, Esquire, and the University of South Carolina (USC), represented by Russell H. Putnam, Jr., Esquire and Henry P. Wall, Esquire. Cullum Mechanical Construction, a recipient of a subpoena issued by the Panel, but not a party to the proceeding, is represented by Capers G. Barr, III, Esquire. The Office of General Services is represented by Delbert H. Singleton, Jr., Esquire. This Order is issued without conducting a hearing after the parties, and Cullum, were given the opportunity to provide memorandum in support or opposition to Masterclean's Motion to Compel Cullum's compliance with the subpoena.

#### **FINDINGS OF FACT**

The following are the facts relevant to the motion to compel in this case. Masterclean and USC entered a contract for asbestos abatement, which is the subject of this controversy. It is alleged Masterclean did not complete the work, and USC issued an invitation to bid the work needed to complete the project. Upon request by Masterclean, the Panel issued subpoenas for documents on

September 5, 1996, that included a subpoena for Cullum Mechanical Construction. Cullum is not a party to the proceeding, but is involved in a contract with USC which is alleged to be work left unfinished by Masterclean. USC seeks the cost of Cullum's work as part of its damages in this case. Cullum was awarded the work through a competitive bid process.

The subpoena requires Cullum to produce "all takeoffs, estimates, quantity surveys, job surveys, bids, invoices, time records and all of the documents contained in the project file." The back of the subpoena contains language very similar to the language required under South Carolina Civil Procedure Rule 45, that applies to subpoenas in civil actions. The person to which the subpoena is directed is allowed to object in writing to the party or attorney designated in the subpoena. Cullum sent an objection to Masterclean, on October 8, 1996. (See, Cullum's Exhibit B attached to its memorandum). Cullum expressed concern for proprietary information. Masterclean responded by letter dated October 9, 1996, suggesting that specific documents could be protected by agreement and/or seeking a protective order. Cullum has not produced any documents in response to the subpoena, which had a compliance date of October 31, 1996.

Masterclean filed a motion to compel Cullum to comply with the subpoena. Masterclean is concerned with Cullum's work on the project, because USC is claiming the cost of the work Cullum is performing, as part of the damages in the case on the merits.

#### **CONCLUSIONS OF LAW**

Masterclean's memo in support of its motion to compel argues that Masterclean is entitled to know what cost and work items Cullum included in its bid, how Cullum determined its contract prices, Cullum's actual costs incurred, and similar information so that it can determine whether all of the amounts claimed by USC are related to Masterclean's contract with USC and if the amounts are reasonable. Masterclean claims that this information is not available from any other source. Masterclean also claims Cullum waived any right to complain because it did not move to quash the subpoena. Several federal cases from various jurisdictions are discussed as supporting Masterclean's position, which the Panel recognizes as persuasive but not dispositive.

Cullum argues in opposition to the motion that it objected to the subpoena in writing, as was allowed on the back of the subpoena. Cullum argues that Masterclean has not shown that it has a substantial need for the documents subpoenaed which cannot otherwise be met. Cullum points out that the documents are not needed by Masterclean because it can prove pricing and cost issues through expert witness testimony. Also, Masterclean can get nonproprietary documents from USC's project file. Cullum argues that most of the documents requested are confidential, and contain commercial proprietary interests, which should be protected from being revealed to Masterclean, which is a competitor of Cullum. Cullum also argues that the request for all documents in the project file is too broad and burdensome. Cullum distinguishes each case

discussed by Masterclean, and asks for a protective order if the subpoena is enforced.

Masterclean's reply memo restates its need for the documents and inability to obtain them from another source. Masterclean states its need to show USC's short bid deadline and the need to show the work included within Cullum's bid is within the scope of Masterclean's original contract. It contends that Cullum's concerns can be addressed with a protective order.

As both parties have agreed, a balance between the interests of the participants should be reached by weighing the need for confidentiality with the need for information. The difficulty in weighing these interests is the lack of specific information from the participants as to the documents at issue. The participants have not provided information concerning specific documents, but only made general arguments in support of their positions. Masterclean has not shown how the documents requested are necessary, and for what specific purpose of proof and how they are specifically relevant to the issues raised in the case. Neither has Masterclean shown why the information cannot be obtained from another source, specifically USC. Likewise Cullum has not shown which specific documents are confidential and proprietary. Neither has Cullum explained specifically how it will be burdened by production of nonconfidential documents, which it has admitted it has not produced. Despite this, the Panel makes the following determinations based on the information before it.

Based on Masterclean's stated need for documents to show that Cullum's work is within the scope of Masterclean's contract, a review of the bid documents

and any partial payments should reveal the scope of work on Cullum's contract. Although bid information and payment information is available from USC, Cullum also has this information, and it is not confidential. Cullum may not fail to comply with a subpoena by making a blanket statement that information is proprietary and it is burdensome to produce nonproprietary information. However, the Panel agrees that Cullum, a nonparty, was not required to file a motion to quash the subpoena, but was allowed to object in writing to the party serving the subpoena, which could then move to compel production. Cullum has not waived its right to object to the subpoena by not filing a motion to quash.

Because Cullum's contract with USC was awarded by competitive sealed bid, the extent of the work to be done is spelled out in the bid documents, which is public information. How Cullum arrived at its bid is not public information, but an internal process that is proprietary. If Masterclean believes Cullum's cost for the work is unreasonable, Masterclean, with its knowledge of the scope of work from the bid documents, may explore that possibility through other avenues. On the other hand, although some of Cullum's documents may be proprietary, not all of the documents in its file are proprietary.

The Panel modifies the subpoena issued on September 5, 1996, to Cullum Mechanical Construction to provide that the documents in Cullum's file for this project that are not proprietary must be made available for Masterclean's inspection. Proprietary documents may include but are not limited to information used to calculate costs and prices for the bid and internal documents involving the calculation of costs.

### **CONCLUSION**

For the reasons stated above, the Panel hereby modifies the subpoena issued to Cullum Mechanical Construction to provide that the documents in Cullum's project file for this project that are not proprietary must be made available for Masterclean's inspection, as arranged by the participants, by January 13, 1997.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

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Gus J. Roberts, Chairman

Columbia, S. C.

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